DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CA05-1388

MAY 31, 2006

SANDRA MOSES
APPELLANT

V.

DAVID CASTRO-LOPEZ and
FARMERS INSURANCE COMPANY
APPELLEES

APPEAL FROM THE BAXTER COUNTY CIRCUIT COURT
[NO. CV-2005-88-2]

HON. DAVID S. CLINGER, JUDGE

REVERSED AND REMANDED

Appellant Sandra Moses appeals from the trial court's decision to grant a motion to enforce a tort-claim settlement agreement filed by appellee Farmers Insurance Company, Inc. (Farmers). Because the trial court did not conduct an evidentiary hearing on the motion, we reverse and remand.

The facts of this case are as follows. On May 8, 2004, Moses was involved in an automobile accident in which the vehicle that she was driving was struck by a vehicle driven by appellee David Castro-Lopez. Both Moses and Castro-Lopez were insured by Farmers.

In December 2004, Farmers paid $5,000 to Moses, under the first-party medical-payments coverage provided by the policy on her automobile, for medical expenses incurred by her as a result of the accident.[1] On January 19, 2005, Moses, by attorney Ken Swindle of

[1] Moses's policy had a $5,000 limit on payments for medical expenses.

Rogers, filed a tort action against Castro-Lopez to recover damages for her medical expenses, pain and suffering, and mental anguish resulting from the accident. A February 8, 2005, letter from Farmers's senior claims representative, Melissa Tipps, to Swindle stated in part as follows:

> As you are aware, Ms. Moses has collected $5000.00 from her policy to date for her medical coverage. Accordingly, we can extend an offer of $5,000.00 new money to reflect this prior payment of the medical charges.
>
> Please discuss this offer with your client and advise me of your position. We look forward to hearing from you.

Swindle responded by letter dated February 28, 2005, stating that, "After meeting with Ms. Moses, I have authority to accept your offer $10,000.00 [sic] to settle this matter." In the meantime, Farmers, through its attorney, Jon A. Robinson, of Fayetteville, had filed an answer to Moses's complaint on February 23, 2005. On March 1, 2005, Robinson wrote to Swindle:

> Please find enclosed the settlement documents in reference to the above-captioned[matter]. I have ordered the settlement check from Farmers and as soon as it is received I will forward it to you.

On March 7, 2005, Swindle wrote to Robinson stating:

> Per your request, please allow this letter to confirm our conversation in which I agreed to protect Farmers' Insurance Company from any alleged lien in this matter. Therefore, would you please make sure that only my name and Ms. Moses' name is on the settlement check? If you need anything else, please let me know.

On March 21, 2005, Robinson sent a $10,000 "settlement check" to Swindle, made payable to Moses, Swindle, and Farmers. An accompanying letter requested Moses to execute a release that required her to pay $5,000 of the proceeds to Farmers for its "subrogation claim."

Moses refused to sign the release and, on March 25, 2005, filed a "Petition for Declaratory Judgment" claiming that Farmers had failed to establish an enforceable subrogation lien on the $10,000 settlement check because (1) Moses had not been "made whole" by the settlement, and (2) payments for the liability coverage and the personal injury protection coverage were made from "one source." Farmers responded to the petition by asserting that the settlement agreement between the parties was for $5,000 in "new money," as evidenced by the correspondence between Farmers and Moses's counsel. Farmers specifically asserted that this correspondence "clearly evidence[d] the awareness of [Moses's] counsel that Farmers Insurance Company was asserting a lien."

On April 25, 2005, Moses filed a "Motion for Summary Judgment on Plaintiff's Petition for Declaratory Judgment" pointing out that, if she accepted the $10,000 settlement offer subject to the $5,000 subrogation lien, then she would *owe* $1,574.48. Moses therefore claimed that she was not "made whole" by the settlement and asked the trial court to grant summary judgment in her favor. Farmers responded by again asserting that the correspondence between the parties evidenced the intent of the parties that Moses would reimburse Farmers for its subrogation claim. On April 26, 2005, Farmers filed a "Motion to Enforce Alleged Settlement Agreement and to Dismiss Plaintiff's Petition for Declaratory Judgment," once again claiming that the parties had reached a settlement agreement for $10,000, $5,000 of which would be paid to Farmers as reimbursement for its subrogation claim. Alternatively, the motion requested that, if the court found no "meeting of the minds" sufficient to establish a binding settlement agreement, then the court should "set aside the

alleged settlement agreement and allow [Moses's] claim against David Castro-Lopez to proceed …." Moses did not file a response to Farmers's motion.

On June 3, 2005, Farmers filed a supplement to its motion, attaching as an exhibit an affidavit executed on May 27, 2005, by Melissa Tipps. The affidavit stated in part as follows:

> 1. My name is Melissa Tipps and I am a claims representative of Farmers Insurance Company, Inc. On February 8, 2005, I sent correspondence to Ken Swindle offering to settle the claim of Sandra Moses against David Castro-Lopez for $5,000 in addition to $5,000 previously paid under her own policy with Farmers. …
>
> 2. Ken Swindle sent a return letter indicating that his client had accepted the settlement offer.
>
> 3. A check in the amount of $10,000 was sent to Mr. Swindle to settle the claim. $5,000 was for Sandra Moses. The remaining $5,000 was to reimburse Farmers Insurance Company, Inc., as insurer of Sandra Moses, for the medical payments made on her behalf. The result would be a total of $10,000 to Sandra Moses and this was the agreement reached between Farmers and Ken Swindle.

On June 6, 2005, Moses filed a motion to prohibit the supplement, asserting that counsel for Farmers had refused to make Melissa Tipps available for deposition. Alternatively, Moses asked the court to order the deposition of Ms. Tipps.

At a hearing held on June 23, 2005, the court considered Moses's petition for declaratory judgment and her motion for summary judgment, as well as Farmers's motion to enforce the settlement agreement. During this hearing, the court refused to allow Moses to present testimony. Specifically, when Moses's attorney, Ken Swindle, asserted that he had a "recorded conversation" with Melissa Tipps that was witnessed by Moses, Farmers's counsel objected, and the following colloquy occurred:

> MOSES'S COUNSEL: My client is right here. She was a witness to the

conversation. We can put her on the stand right now.

THE COURT: Well, let's don't refer to an out-of-court statement. It's not here. You may have her recorded, but it's not here. It's not in evidence. Let's just move on and address these issues.

MOSES'S COUNSEL: And, and Your Honor, I couldn't get it into evidence because he's not allowing me to take the deposition. But in essence, this was – the conclusion of the conversation without trying to repeat it was the representative had evaluated this case at $10,000.

FARMERS'S COUNSEL: Your Honor, I've already objected to that. If the court wants to listen to it, I object to it being considered. He is not a witness and that's what he's trying to do is testify.

THE COURT: Looks like we're trying to get – I'm going to argue the pleadings here. We're not – it's not an evidentiary hearing, at least not yet.

The court thus refused Moses's request to present evidence at the hearing, and the court's final ruling was as follows:

> Now, I have – I've gone back and reviewed the pleadings and read some of this case law and tried to settle – work my way through the arguments that were made by both sides. And my – the ruling that I am making is, I believe, to be based upon the evidence that's before the court at the present time in the pleadings and attachments.
>
> The plaintiff's motion for summary judgment is overruled. I further find from my review of this evidence that there was a settlement reached for a total of $10,000. It was clearly intended by the documentation to be a settlement of $5,000 over and above Farmers' subrogation claim. Therefore, it was an agreement for $10,000. In my opinion, the evidence makes it clear that in making this agreement the plaintiff, in essence, waived any not-made-whole defense to Farmers' subrogation claim. This was a settlement, and I will grant the motion to enforce that settlement.

In a written order filed on September 27, 2005, the trial court ordered Moses and her attorney to sign the release, dismissed Moses's complaint in tort against Castro-Lopez, and

also dismissed Moses's petition for declaratory judgment. On appeal, Moses raises three points: (1) that the trial court erred in granting Farmers's motion to enforce the settlement agreement; (2) that the trial court erred in allowing subrogation because Moses was not made whole; and (3) that the trial court erred in dismissing her motion for declaratory judgment because she was entitled to a trial on the merits.

Moses first contends that the trial court erred in granting Farmers's motion to enforce the settlement agreement. To support this contention, Moses offers three arguments: (1) that the trial court improperly considered Farmers's "unverified exhibit and untimely affidavit" that were filed in violation of Ark. R. Civ. P. 56; (2) that the trial court erred in refusing to allow Moses to respond to the affidavit by taking a deposition or "otherwise"; and (3) that the trial court erred in granting Farmers's motion for summary judgment[2] because there were contested issues of material fact and the court should have allowed Moses to present testimony in an evidentiary hearing. Because we agree that the trial court should have conducted an evidentiary hearing, we need not consider Moses's remaining points on appeal.

We must first clarify that Farmers's motion was not a summary judgment motion; rather, it was a motion to enforce the alleged settlement agreement and to dismiss any claim to the contrary. In *Gatz v. Southwest Bank of Omaha*, 836 F.2d 1089, 1095 (8th Cir. 1988), the United States Court of Appeals for the Eighth Circuit stated:

[2] Moses is apparently referring to Farmers's "Motion to Enforce Alleged Settlement Agreement and to Dismiss Plaintiff's Petition for Declaratory Judgment." Farmers did not file a summary judgment motion in this case.

> A district court has the inherent power to summarily enforce a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous. The district court must hold an evidentiary hearing, however, when there is a substantial factual dispute concerning the existence or terms of the settlement agreement ... or when the situation presents complex factual issues.

(Citations omitted.) We see no reason why this logic could not also apply in this case.

At the hearing on June 23, 2005, the trial court considered certain correspondence between the parties concerning an alleged settlement agreement. This correspondence included the February 8, 2005, letter from Farmers's senior claims representative, Melissa Tipps, to Moses's counsel Ken Swindle, which stated in part as follows:

> As you are aware, Ms. Moses has collected $5000.00 from her policy to date for her medical coverage. Accordingly, we can extend an offer of $5,000.00 new money to reflect this prior payment of the medical charges.
>
> Please discuss this offer with your client and advise me of your position. We look forward to hearing from you.

The court also considered Swindle's response in a letter dated February 28, 2005, stating that, "After meeting with Ms. Moses, I have authority to accept your offer $10,000.00 [sic] to settle this matter." Other correspondence before the court included a March 1, 2005, letter in which Farmers's counsel, Jon Robinson, wrote to Swindle:

> Please find enclosed the settlement documents in reference to the above-captioned [matter]. I have ordered the settlement check from Farmers and as soon as it is received I will forward it to you.

In addition, on March 7, 2005, Swindle wrote to Robinson, stating:

> Per your request, please allow this letter to confirm our conversation in which I agreed to protect Farmers' Insurance Company from any alleged lien in this matter. Therefore, would you please make sure that only my name and Ms. Moses' name is on the settlement check? If you need anything else, please let me know.

On March 21, 2005, Robinson sent a $10,000 "settlement check" to Swindle, made payable to Moses, Swindle, and Farmers. An accompanying letter requested that Moses execute a release requiring her to pay $5,000 of the proceeds to Farmers for its "subrogation claim," and Moses refused.

Moses now claims that the issue of "[w]hether or not there was an agreement as to payment of [Farmers's] subrogation claim could not be decided summarily on the record" and that she should have been allowed to introduce testimony at the hearing on Farmers's motion to enforce the settlement agreement. We agree. The only evidence considered by the trial judge to explain the correspondence above was an affidavit by Farmers's claims representative Melissa Tipps, which stated in relevant part as follows:

> My name is Melissa Tipps and I am a claims representative of Farmers Insurance Company, Inc. On February 8, 2005, I sent correspondence to Ken Swindle offering to settle the claim of Sandra Moses against David Castro-Lopez for $5,000 in addition to $5,000 previously paid under her own policy with Farmers. …
>
> A check in the amount of $10,000 was sent to Mr. Swindle to settle the claim. $5,000 was for Sandra Moses. The remaining $5,000 was to reimburse Farmers Insurance Company, Inc., as insurer of Sandra Moses, for the medical payments made on her behalf. The result would be a total of $10,000 to Sandra Moses and this was the agreement reached between Farmers and Ken Swindle.

Although Swindle announced to the court that Moses was present at the hearing and was prepared to offer testimony that refuted Farmers's contention that a settlement agreement had been reached, the court refused to allow Moses to testify.

Contrary to the assertion in Tipps's affidavit, it is not clear that Tipps's February 8, 2005 letter to Swindle extended an offer to pay Moses "$5,000 in addition to the $5,000

previously paid under her own policy with Farmers. ...” Rather, Farmers’s February 8, 2005, letter, after noting that Moses had already collected $5,000 under her policy for medical expenses, extended a settlement offer of “$5,000.00 new money to reflect this prior payment of the medical charges.” At the very least, this language is ambiguous as to what amount of money Farmers was offering to settle Moses’s tort claims against Castro-Lopez. There is no language in Tipps’s February 8 letter to indicate that Farmers would assert a subrogation lien against the settlement proceeds. Nor is a subrogation lien mentioned in Robinson’s March 1, 2005, letter to Swindle.

Furthermore, Swindle’s March 7, 2005, letter to Farmers’s attorney did not state that Swindle agreed to protect Farmers’s subrogation lien; rather, it stated that Swindle agreed to protect Farmers *from* any lien. This language is likewise ambiguous in the absence of some explanation of what lien Swindle was agreeing to protect Farmers from. Finally, Swindle’s request that the settlement check be made payable only to Swindle and Moses, which request Farmers ignored, gives rise to some doubt as to whether Swindle had agreed to protect Farmers’s subrogation lien.

Because, in our opinion, there is in this case a substantial factual dispute concerning the existence of a settlement agreement or the terms thereof, we hold that the trial court was required to conduct an evidentiary hearing on Farmers’s motion to enforce the agreement.We therefore reverse and remand with instructions to the trial court to conduct an evidentiary hearing to determine whether a settlement agreement existed, and, if so, to pronounce the terms thereof.

Reversed and remanded.

GLOVER and CRABTREE, JJ., agree.